Supreme Court, U.S.
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NO. 95-1439

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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JOAN M. LAKOSKI, PH.D.,
Petitioner

v.

THE UNIVERSITY OF TEXAS
MEDICAL BRANCH AT GALVESTON,
Respondent

****

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

****

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May an employee of a federally assisted educational institution bypass the deadlines and limitations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in order to sue soley under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, for damages for sex discrimination in employment?

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STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

STATEMENT OF THE CASE

This is an action for damages for alleged intentional sex discrimination in employment. Petitioner Joan Lakoski was a tenure-track assistant professor and member of the faculty of the Pharmacology Department at the University of Texas Medical Branch at Galveston. After being rejected for the third time for promotion and tenure, she sued the University and three officials, alleging that denial of promotion and tenure and termination from employment were acts of intentional gender

discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"); the Civil Rights Act of 1871, 42 U.S.C. § 1983; and state tort law. Lakoski did not file an EEOC charge of discrimination, nor did she plead Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), as a ground of recovery. Her claim of sex discrimination against the University is grounded solely on Title IX.

At the conclusion of her post doctoral work at Yale, where she had been highly productive in the lab of her mentor, Lakoski joined the University staff as a tenure-track assistant professor for the Department of Pharmacology in 1984 on a nine-year system. Under the University's tenure system, Lakoski was entitled to a mandatory review for tenure by the beginning of her eighth year, and if she failed to meet the University's criteria for tenure, her appointment with the University would not be renewed. Lakoski's so-called "up-or-out year" would have been in 1992, which would have been her eighth year with the University.

Prior to 1991, Lakoski was twice considered for promotion to associate professor and unanimously turned down because of insufficient publication of quality scholarly articles and inappropriate treatment of colleagues. In February 1991, she was again reviewed for promotion, and again the departmental Appointment, Promotion, and Tenure committee unanimously recommended that she not be promoted, and further recommended that she not be considered for tenure.

The departmental chairman concurred with the committee. Thereafter, he advised Lakoski that unless a transfer to another department at UTMB could be arranged, her next appointment would be terminal. As a result of her chairman's and dean's efforts, the UTMB Psychiatry Department offered Lakoski a position with promotion to associate professor and early consideration for tenure. But she refused this offer, and was

subsequently notified that her appointment for 1991-92 was terminal.

Plaintiff subsequently took a position at Pennsylvania State University, as a tenure-track associate professor at a somewhat lower salary than she had been offered by the UTMB Psychiatry Department. At the time of trial, Lakoski was a member of the faculty at that university.

Lakoski originally sought reinstatement, along with compensatory and punitive damages, but, having found a faculty position at another university by the time of trial, she abandoned her claim for reinstatement and sought only damages. At the close of the evidence, the trial court dismissed all claims against all defendants except the Title IX claim against UTMB for actual damages[1] and injunctive relief. The jury found for Lakoski and awarded her $250,000. Overruling UTMB's motions for judgment as a matter of law and/or for new trial, but granting remittitur, the trial court awarded Lakoski judgment for $150,000 in damages, attorney fees of $110,000, and a permanent injunction directing UTMB to append copies of the court's judgment to specific documents in Lakoski's university record.

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed and rendered judgment for the respondent herein. *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995); Pet. Appendix (App.). The Fifth Circuit, "not persuaded that Congress intended that Title IX offer a bypass of the remedial process of

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[1] The trial court submitted to the jury the issues of damages for backpay, future lost earnings, and mental anguish. The verdict form did not differentiate between the amount for backpay and the amount for mental anguish. However, in its remittitur, the court indicated that Lakoski requested $150,000 for backpay, and $100,000 for mental anguish. The court felt that both amounts were excessive in light of the evidence, and reduced the amount for backpay to $100,000 and the amount for mental anguish to $50,000. Lakoski also requested $147,164 in fees, and $8,165.25 in costs. The court reduced fees and costs to $110,288 combined.

Title VII," held "that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Id.* at 66 F.3d 753. However, the court "limit[ed its] holding to individuals seeking money damages under Title IX . . . for employment practices for which Title VII provides the remedy . . ." *Id.*

From that decision, Lakoski petitions for the Court's review.

ARGUMENTS FOR DENYING THE PETITION

I. The Fifth Circuit Holding In This Case Does Not Have A Wide Application.

Because Lakoski did not file suit under Title VII, having missed the deadline for filing an EEOC charge, the Fifth Circuit's holding that she could not maintain a Title IX action for damages for employment discrimination had the effect of leaving her without a remedy. But very few litigants are likely to find themselves in that predicament.

The reality is that only a very narrow class of potential plaintiffs would benefit from reversal of the Fifth Circuit decision in this case. That is, the only putative victim of sex discrimination by a federally assisted educational program whose ability to litigate a claim for damages could be impacted by the *Lakoski* decision would be an employee who (1) fails to comply with a prerequisite for suit under Title VII, and/or (2) seeks relief in excess of the limits imposed by Title VII. Not many prospective plaintiffs are likely to fall into either category.

For a quarter of century, postsecondary education personnel have had access to Title VII for employment discrimination. *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 524, 102 S.Ct. 1912, 1919 (1982); *Lakoski v. James, supra*, 66 F.3d at 756. It seems highly improbable that any academic employee who is

aware of her rights under Title IX would be at the same time unaware of her remedies under Title VII. Once she perceives herself to have suffered discrimination on the basis of her sex, the employee has at least six months in which to decide whether to invoke the Title VII procedures by filing a charge of discrimination. 42 U.S.C. § 2000e-5(e)(1). In most states, as in Texas, the employee has 300 days. *Id.*; *Griffin v. City of Dallas*, 26 F.3d 610, 612-613 (5th Cir. 1994). Lakoski was the rare employee who, having let ten months elapse without exercising her Title VII options, decided within the next fourteen months (before the expiration of the Title IX limitations period) to litigate the employment decision to which she objected.

The aberrance of Lakoski's situation is well illustrated by authorities on which she relies in her petition. Although the amendments creating Title IX and extending Title VII to states and universities have been on the books since 1972, the petitioner could cite only three circuit cases, other than Lakoski's own, even arguably addressing the issue of parallel Title VII and Title IX remedies for employment discrimination. As shown in III below, only one of those three was a bona fide employment case and in it the plaintiff sued under *both* Title VII and Title IX. That, of course, is what Lakoski neglected to do. In short, Lakoski's dilemma is simply not likely to arise with much frequency.

The second category of affected individuals, victims of sex discrimination by educational employers whose damages exceed the Title VII limits, does not appear to be a much larger group. As a policy matter, there is no evidence in the record of this case that educational employees are more likely to face that shortfall than any others. Nor is there any indication in the relevant legislative history that Congress was more concerned that employees of federally assisted educational programs be fully compensated for sex discrimination than it was with respect to other classes of employees.

At any rate, Lakoski's case does not pose this question for the Court. Even without the remittitur, the damages and attorneys' fees awarded to Lakoski fell well within the Title VII limits. 42 U.S.C. §§ 1981a(b)(3)(D), 2000e-5(g). Because Title VII places no limits on backpay and attorneys fees, *id.*, the Fifth Circuit decision in *Lakoski* would preclude a measure of relief only to those victims of employment sex discrimination in federally funded educational programs whose anguish, pain, and future pecuniary loss exceed $300,000 each. A computer search by respondent's counsel disclosed no Title IX employment case in which such an amount was awarded in damages. Nor has Lakoski cited any.

It follows from all the foregoing that any ruling by this Court in this case will provide guidance for only a small handful of litigants. Ironically, however, if the Court grants *certiorari* and reverses the Fifth Circuit in this case, it may generate much wider applicability than the decision would otherwise have. As illustrated by cases such as *Preston* and *Mabry*, examined in III below, plaintiffs alleging sex discrimination by educational employers have until now tended to sue under Title VII, either exclusively or in conjunction with Title IX. If this Court adopts Lakoski's position, many more plaintiffs can be expected to ignore Title VII altogether, bypassing its tighter timetable and stricter limits on relief, to sue under Title IX alone. Educational employers, then, in contrast to all other employers, will face potentially unlimited liability and greater uncertainty in controversies over alleged sex discrimination in employment.

II. The Fifth Circuit Decision In This Case Does Not Conflict With Any Decision of the Supreme Court.

Lakoski argues that the Fifth Circuit's holding in her case conflicts with three decisions of this Court -- not with any of the decisions by itself but with the three in combination. Petition for Writ of Certiorari ("Pet.") at 3-6, discussing *Cannon v. University of Chicago*, 441 U.S. 675, 99 S.Ct. 1946 (1979); *North Haven Board of Education v. Bell*, 456 U.S. 512, 102

S.Ct. 1912 (1982); *Franklin v. Gwinnett County Schools*, 503 U.S. 60, 112 S.Ct. 1028 (1992). However, the *Lakoski* result is neither precluded nor compelled by the foregoing decisions. Each on its own merits is distinguishable, and the whole is not greater than the sum of its parts.

Neither singly nor in combination did the three cited cases call upon this Court to determine the respective scopes of Title VII and IX in the context of damages for employment discrimination. In *Cannon*, the plaintiff sought admission to medical school. *Id.*, 441 U.S. at 680, 99 S.Ct. at 1949. Thus, the case provides no guidance for employment suits. Neither the Fifth Circuit nor the respondent has ever denied that the full panoply of Title IX rights and remedies, including damages, is applicable to a controversy between a past, present, or prospective *student* and a federally funded educational institution. The same distinction applies to *Franklin, supra*, in which a student sued a school district for damages due to alleged sexual harassment by a teacher.

North Haven unquestionably applies Title IX to employment, but not for purposes of a private right of action, much less a claim for damages. As explained in the opening words of Justice Blackmun's opinion: "At issue here is the *validity of regulations* promulgated by the Department of Education pursuant to Title IX . . ." *Id.* at 456 U.S. *North Haven* 514, 102 S.Ct. 1914 (emphasis added). Neither in nor in any other case has this Court held that the scope of the private right of action inferred in *Cannon* (for which a damages remedy was implied in *Franklin*) is coextensive with that of the Department of Education's regulatory authority under Title IX. While the two overlap, they are nevertheless distinct.

This Court recognized in *Cannon* that "Title IX . . . sought to accomplish two related, *but nevertheless somewhat different*, objectives." 441 U.S. 704, 99 S.Ct. 1961 (emphasis original). "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide

individual citizens effective protection against those practices." *Id.* It is the first purpose above that is served by the funds-termination provision and related regulations-writing authority examined in *North Haven*.[2] *Cannon, supra*, at 441 U.S. 704, 99 S.Ct. 1961; *North Haven, supra*, at 456 U.S. 536-537, 102 S.Ct. 1926.

The existence of adequate remedies through another federal statute is irrelevant to the first purpose, that served by the regulations in *North Haven*. That is, Congress and the Department of Education do not want federal funds to subsidize any form of sex discrimination in education, regardless of what alternative remedies might be available.

The existence of an adequate alternative judicial remedy is highly relevant, however, to the second purpose: insuring that each individual intended beneficiary is protected. In *Cannon*, this Court implied a private right of action for a woman denied admission to medical school, because the only other available "remedy," termination of federal funds to the entire school, was inadequate to serve the second purpose of protecting the individual. *Id.* at 441 U.S. 705-706, 99 S.Ct. 1962. Similarly, in *Franklin*, this Court concluded that the insufficiency of proposed alternatives (backpay and prospective injunction) to serve the second purpose of Title IX made a damage remedy necessary for a sexually harassed student. *Id.* at 503 U.S. 76, 112 S.Ct. 1038.

Thus, *North Haven's* conclusion that federal Title IX regulations may include employment does not answer the question of whether an individual's private right of action under Title IX includes a claim for damages for employment discrimination.[3] With respect to the Title IX private right of

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[2] None of the Department of Education regulations in question purport to address the scope of a protected individual's private right of action.

[3] Note that in *North Haven*, the "[p]etitioners contend[ed] that Title IX was not meant to reach the employment practices of educational institutions."

action, neither *Cannon* nor *Franklin* dealt with a situation in which the second purpose of Title IX was adequately and appropriately served through pre-existing remedies under another federal statute. And none of the three decisions authorize a Title IX damages remedy when "[d]oing so would disrupt a carefully balanced remedial scheme for redressing" the type of discrimination challenged by the plaintiff in question. *Lakoski, supra*, at 66 F.3d 754.

III. The Fifth Circuit Decision In This Case Does Not Conflict With That Of Any Other Circuit.

A. The Petitioner Has Failed To Identify A Genuine Conflict.

Lakoski does not, and cannot, offer a single case in which another circuit has reached a result directly contrary to the Fifth Circuit's holding in this case. In none of the cases cited by the petitioner in part II of the Argument section of her petition would the reasoning or holding in *Lakoski* compel a different outcome. The most that Lakoski can assert is that "other circuits *did not have any problem with* Title IX employment claims being made wholly independent of Title VII." Pet. at 7 (emphasis added).

One of the three decisions relied upon by Lakoski did not concern employment discrimination at all. The plaintiff in *Pfeiffer* was a high school student who challenged her dismissal from a school organization. *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779, 780-783 (3rd Cir. 1990). As Title VII provides no conceivable remedy in that circumstance, the *Lakoski* issues and holding would have been utterly inapplicable to that case.

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456 U.S. 518, 102 S.Ct. 916. That position, of course, goes far beyond what the respondent has argued or the Fifth Circuit held in the present case.

In *Preston v. Commonwealth of Virginia ex rel New River Community College*, 31 F.3d 203, 205 (4th Cir. 1994), the plaintiff sued under *both* Title VII and Title IX, which alone is enough to distinguish that suit from Lakoski's. case. The holding that Title VII provides the exclusive federal statutory damages remedy for sex discrimination in employment would be at most dictum for *Preston* because it would not alter the outcome. That is, the plaintiff would still be free to pursue the same relief under Title VII as she sought under Title IX.

Of the three decisions cited by the petitioner, *Preston* most closely approaches a genuine conflict with *Lakoski*, concluding that Title IX's "implied right [of action] extends to employment discrimination on the basis of gender by education institutions receiving federal funds." 31 F.3d 206. However, although a footnote makes apparent the Fourth Circuit's view that the implied right of action includes a claim for damages even for employment discrimination, *id.* at 205 n. 1, because of the trial results *Preston's* Title IX holding is limited entirely to the context of the plaintiff's claim for injunctive and declaratory relief. In *Lakoski*, the Fifth Circuit left open the question of whether the exclusivity of the Title VII damages remedy for employment discrimination would preclude a Title IX employment claim solely for declaratory or injunctive relief. 66 F.2d at 753; App. at 5.

In *Preston*, the trial court presented the same liability question to the jury for purposes of both the Title VII and the Title IX claims. 31 F.3d 205. After the jury found for the defendant on the undifferentiated liability issue, the plaintiff nevertheless apparently petitioned the trial court (in its equity capacity) for injunctive and declaratory relief under Title IX, which the court denied. *Id.* Holding that the elements of a Title IX retaliation claim are the same as for a Title VII retaliation claim, the Fourth Circuit affirmed the denial of Title IX relief. *Id.* at 206-208.

Thus, the bottom line in *Preston* would be the same with or without the separate Title IX employment claim. The case would be tried on the same issues for the same relief, with the same result.

The Fifth Circuit's *Lakoski* decision likewise would not have altered the outcome in *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). That case was not a pure employment discrimination action. Instead, as a participant in a medical school's surgical residency program, the plaintiff was a hybrid between a student and employee. 864 F.2d 884, 897. That is, an integral element of a medical resident's training program is his or her employment as a physician on the staff of a hospital. 864 F.2d 886. Dismissal from the medical school results in termination from the hospital and vice-versa. *Id.* at 890-892. All of the original defendants in *Lipsett* were affiliated with the medical school, of whom one, the Director of Training at the San Juan V.A. Hospital, was also an official of the employing hospital. 864 F.2d 884-885 & nn. 1, 5.

Because Lakoski was unquestionably an employee and not a student, the Fifth Circuit decision in this case would not apply directly to the *Lipsett* facts. It is premature at best to speculate whether the *Lakoski* reasoning could be stretched so far as to make Title VII the exclusive damages remedy for the discriminatory dismissal of a medical resident. Thus far, neither the Fifth Circuit, nor any other court the respondent is aware of, has done so.[4]

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[4] Interestingly, the First Circuit in *Lipsett* relied on *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849, 108 S.Ct. 148 (1987). Like Preston but unlike Lakoski, Mabry sued under both Title VII and Title IX. 813 F.2d 313. The decision provides no indication that the defendants contested Mabry's right to bring an employment-related damages claim under Title IX. The *Mabry* holding, that an earlier Title VII judgment precluded Title IX relief by collateral estoppel, would not have been materially altered by the *Lakoski* holding.

B. The *Lakoski* Issue Has Not Received A Full Airing In The Courts Below.

As shown in the preceding section, except for dictum in *Preston*, the Fifth Circuit's *Lakoski* decision is the only case in which a court of appeals has squarely addressed the issue of whether a plaintiff, in addition to or instead of Title VII, may sue under Title IX for damages for employment-related sex discrimination. Even if the cases cited by Lakoski represented genuine conflicts -- which, as shown, they do not -- it would mean that only four of the twelve regional circuits have examined the issue.

Consequently, the issue raised by the Fifth Circuit decision in this case has not "percolated" sufficiently among the circuits to merit Supreme Court review at this time.

IV. The Fifth Circuit Decision In This Case Does Not Conflict With Public Policy

Finally, Lakoski argues in her petition at 8-10 that the Fifth Circuit's decision somehow runs afoul of two post-Title IX Congressional enactments, the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, and the Civil Rights Act of 1991. Of course, neither of the latter statutes purports to interpret the intent of the 1972 Education Amendments, which simultaneously created Title IX and extended Title VII remedies to educational employees. Even if they did, this Court has "observed on more than one occasion that the interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168, 109 S.Ct. 2854, 2862 (1989).

Section 2000d-7 abrogated Eleventh Amendment immunity to a Title IX suit. The Fifth Circuit's *Lakoski* decision does nothing to attempt to restore that immunity. Lakoski points to language in § 2000d-7 that the same remedies are available

against state defendants in Title IX actions as against private defendants. Pet. at 9. That, of course, begs the question of whether damages for sex discrimination in employment is one of the remedies available against any Title IX defendant, public or private. The statute does not foreclose the Fifth Circuit's answer.

The Fifth Circuit decision in this case is not merely consistent with the policy manifest in the Civil Rights Act of 1991; it fulfills it. The 1991 act represents a reaffirmation of the emphasis placed by Congress on Title VII as the comprehensive federal remedial scheme for employment discrimination. To the extent that plaintiffs might have found Title VII remedies (previously limited to backpay and reinstatement) wanting, so as to inspire searches for alternative employment remedies, the Civil Rights Act of 1991 responded with the addition of 42 U.S.C. § 1981a.

The 1991 Civil Rights Act's and this Court's recognition of a parallel remedy for *racial* discrimination in employment, Pet. at 4-5, 9, is inapposite. The Civil Rights Act of 1866, 42 U.S.C. § 1981, has roots going back to the abolition of slavery after the Civil War. *See, Runyon v. McCrary*, 427 U.S. 160, 168-169 n. 8, 96 S.Ct. 2586, 2593-2594 n. 8 (1976). Congressional efforts to combat sex discrimination in either employment or education have no such history. Unlike § 1981, Title IX did not pre-date Title VII.

Lakoski's argument in this section of her petition inadvertently illuminates what is really at issue in this case and why this Court should not grant review. In her petition at 8, Lakoski complains that, "In 1995 the E.E.O.C. reported a backlog of some 100,000 charges nationwide, as a consequence of which claimants faced long delays in the investigation of their complaints."[5] The true basis for Lakoski's position in this

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[5] Lakoski goes on to claim that, "faced with serious harm to her career," she bypassed Title VII in order to "sue[ ] under a law which did not require

lawsuit is dissatisfaction with the operation of Title VII in actual practice. However, the remedy for that perceived deficiency is not through this Court. If Title VII is truly not functioning as it was intended, that is a concern more properly addressed to Congress. Titles VII and IX are both statutory measures and should be repaired (if repair is needed) through the legislative process.[6] It is not appropriate to call upon the judiciary to compensate for the perceived inadequacy of one statute by stretching another statute beyond its intended boundaries. In the Civil Rights Act of 1991, Congress demonstrated that when it believes Title VII needs fixing, it is capable of acting.

CONCLUSION

Accordingly, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

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the delay of administrative processing." Pet. at 9. However, the record shows that after being notified in February of 1991 that her tenure was denied and that 1991-92 would be her terminal year, Lakoski waited until August of 1992 to file suit under Title IX. In that year and a half, Lakoski could have sued under Title VII. Within 180 days of filing a charge of discrimination, if the EEOC has not acted the complainant is entitled to obtain a notice of right to sue, which then entitles her to file suit under Title VII. 42 U.S.C. § 2000e-5 (f) (1).

[6] For example, the alleged backlog of EEOC cases is a matter for the budget and appropriations process.

Respectfully submitted,

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